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BEFORE THE BOARD  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF A PETITION TO )  
THE BOARD OF NATURAL RESOURCES AND ) PROPOSAL FOR DECISION  
CONSERVATION FOR DESIGNATION OF A )  
CONTROLLED GROUNDWATER AREA )

\* \* \* \* \*

Pursuant to the Water Use Act, Title 85, MCA (1983) and the  
Administrative Procedures Act, Title 2, Chapter 4, Part 6, the  
above-entitled matter came on for hearing on June 21, 1984 in  
Stevensville, Montana.

I. STATEMENT OF THE CASE

A. Parties

The following persons were in attendance:

1. James L. Scofield
2. Bryan D. Spellman
3. Dr. William Shields
4. Donald Koeppen
5. W.A. Worf
6. Maurice L. Owen
7. Fred & Pat Burnell
8. Rodney W. Prellwitz
9. Sunny B. Smile
10. Mike McBride
11. Robert Sparks

Ronald J. Guse, Administrative Officer, Water Rights Bureau, Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC"), David Pengelly, Missoula Water Rights Bureau Field Office Supervisor, and Paul Lemire, Geohydrologist, DNRC Water Management Bureau, attended on behalf of the Department.

B. Exhibits

The Department offered the following exhibits into the record:

D-1 A collection of documents, including:

- a) letter from Maurice L. Owen, to Mr. Ronald J. Guse, Administrative Officer, received June 1, 1983
- b) letter from Ronald J. Guse, to Mr. Owen, dated April 13, 1982
- c) Petition to form a Controlled Groundwater Area (sent to DNRC with cover letter a), above) received by the Department on June 1, 1983
- d) table entitled "Tabulation of wells drilled near Larson Creek"
- e) letter, from Maurice L. Owen, dated March 15, 1983 re: condition of his well and water supply
- f) letter from Dee Falk, dated March 16, 1983 re: problems with water supply from domestic well
- g) letter from Rodney W. and Barbara J. Prellwitz, dated March 15, 1983, re: documenting domestic water well experience
- h) letter from Otto Knottnerus dated March 14, 1983, re: decline in production of domestic well

- i) a photocopy of a Notice of Completion of Groundwater Appropriation by Means of Well, showing domestic well completion date of November 4, 1969, and showing owner as Rodney Prellwitz (a "received" stamp-mark can be seen on the top of the page but it is substantially illegible)
- j) a photocopy of a Notice of Completion of Groundwater Appropriation by Means of Well, showing: domestic well completion date of August 4, 1972; owner as Mr. & Mrs. (illegible) Falk; and receipt by Administrator (Montana Water Resources Board - a predecessor of the Department) of August 21, 1972 at 4:05 p.m.
- k) a photocopy of a Notice of Completion of Groundwater Appropriation by Means of Well showing: domestic well completion date of August 24, 1972; owner as Clyde McLean; and receipt by Administrator (Montana Water Resources Board) on September 11, 1972 at 3:35 p.m.
- l) a photocopy of a Notice of Completion of Groundwater Appropriation by Means of Well, showing: domestic well completion date of February 22, 1973; owner as Maurice Owen and Esta D. Owen, his wife; and receipt by Administrator (Montana Water Resources Board) on June 8, 1973 at 10:30 p.m.

u) a photocopy of a Notice of Completion of  
Groundwater Appropriation by Means of Well showing:  
domestic well completion date of December 8, 1969;  
owner as Robert Gardner

- D-2 Memorandum dated March 14, 1984 from Paul Lemire,  
Geohydrologist, Hydrosciences Section, to Rich Brasch,  
Supervisor Hydrosciences Section, Water Management  
Bureau, re: Preliminary Geohydrology Report for  
Possible Controlled Groundwater Area at the Larson  
Creek Area, west of Stevensville, Montana (Ravalli  
County).
- D-3 Notice of Hearing and Appointment of Hearing Examiner  
(for Petition to Establish Controlled Groundwater Area)  
with affidavit of service attached.
- D-4 An Affidavit of Publication showing publication of the  
Notice of the Petition and a copy of the Notice  
published. The Affiant stated she published the Notice  
in the Missoulian on May 21 and 28, and June 4, 1984.  
Attached is a copy of a bill from the Missoulian to the  
DNRC for publishing the notice on May 21 and 28, 1984.
- D-5 An Affidavit of Publication showing publication of the  
Notice of Petition, and a copy of the Notice actually  
published. The Affiant stated she published the Notice  
in the Ravalli Republic on May 21, 29 and June 4,  
1984. Attached is what appears to be a bill from the  
Ravalli Republic to the DNRC for publishing the Notice  
on May 21, 29, and June 4, 1984.

D-6 A photocopy of a Well Log Report showing Chuck Spurlock as well owner. Dave Pengelly indicated orally that the current owners are Robert & Nancy Warren, and that the Well Log is a record of the well currently being monitored by a well recorder. The DNRC installed the recorder to record the static water level of the well which is not now being used.

D-7 A photocopy of a map of the area surrounding the area requested for controlled groundwater area designation. The map was prepared by Fred Burnell, and another copy thereof accompanies the petition and supporting documents, D-1. Several of the persons attending the hearing drew in the approximate location of their land ownership on Exhibit D-7.

D-8 Memorandum dated July 17, 1984 from Paul Lemire, to Sarah Bond, re: additional information on the proposed Larson Creek Controlled Groundwater Area (Ravalli County).

All of the Department's Exhibits were received into the record without objection.

### C. Case

The Case arises under the Water Use Act provisions allowing for designation of controlled groundwater areas by the Board of Natural Resources and Conservation (hereafter, the "Board"). §§ 85-2-506, 507 MCA (1983). The petitioners herein are all homeowners in the vicinity of Larson Creek, west of Stevensville,

Montana. All of the petitioners own groundwater wells from which they obtain their domestic water supply. Some of the homeowners have of late experienced increasing difficulty in withdrawing a sufficient volume of water to provide for uninterrupted domestic use. (Testimony of Maurice Owen, letters from Dee Falk, Rodney W. and Barbara J. Prellwitz, and K.L. Knottnerus, D-1).

Testimony at the hearing indicated a general concern among home and landowners in the area that continued development would seriously jeopardize their domestic supply if allowed to proceed without regulatory control. Apparently, at least some of the land within the area requested to be designated is available for subdivision into 1/2 acre tracts. If such development, and the concomitant increased demand on groundwater, occurred, the Petitioners believe their domestic water supply would be depleted. (Testimony, Rodney Prellwitz.)

Some persons attending the hearing expressed agreement with the general notions that a) the groundwater aquifer of concern<sup>1</sup> is a finite resource, b) the shallow aquifer involved is already being tapped to the point where at least two "lows" each year are experienced by well users. During these times, well users typically pump their wells dry through normal domestic use, and must allow some hours of recovery before they are able to resume

<sup>1</sup> The petitioners were specific in referring to only one specific aquifer underlying the land outlined in their map. "The petitioners state all existing wells in the proposed area are tapping a shallow confined aquifer lying from 30 to 50 feet below the ground surface along and recharged by Larson Creek a Tributary of Kootenai Creek." petition, D-1.

use. (Letters, Maurice Owen, Dee Falk, Rodney and Barbara Prellwitz, D-1), and c) that further study of the aquifer and its recharge rate is necessary. (Testimony, Fred Burnell, Paul Lemire, Bryan Spellman, Rodney Prellwitz).

Lastly, a Mr. James Scofield, Ravalli Drilling, expressed opposition to a moratorium on drilling "because that's how I make my living." (Testimony, Mr. Scofield.) Mr. Scofield also pointed out that a reduction in the volume pumped by a well could be caused by proliferation of certain iron bacteria, and that by cleaning the well, such a problem could be eliminated. He believed that any problems experienced by well owners were as likely to be caused by problems associated with the individual's well as they were likely to be the result of a serious decline in the water table or pressure in the aquifer.

Further, Mr. Scofield (a driller with experience in drilling domestic water wells in the Larson Creek area) believed that a limitation on the number of wells, e.g.: no more than 1 well per 5 acres, would not be necessary since the geographical characteristics of the area would naturally prevent development more intensive than that.

Wherefore, based upon the record herein, the Hearing Examiner makes the following Proposed:

## II. FINDINGS OF FACT

1. The Board has jurisdiction over the subject matter herein.
2. The petition was filed with the Department on June 1, 1983.

3. The petition was signed by Maurice L. Owen, Rodney W. Prellwitz, Otto Kottnerus, Dee Falk, Bruce A. Madson, Patricia Burnell and Michael Nile, all domestic well users from a shallow aquifer along Larson Creek through portions of Sections 19 and 20, Township 9 North, Range 20 West, Ravalli County, and underlying approximately 150-200 acres.

4. The petitioners are 7 of 9 <sup>2</sup> domestic well users within the area requested to be designated as controlled (map and list of well owners attached to petition, D-1).

5. The DNRC published a Notice of Hearing setting forth the names of the petitioners, the description of legal subdivision of all lands proposed to be included in the groundwater area, the time and place of the hearing and purpose thereof; and that any interested person could then appear, either in person or by attorney, file written objections to the granting of the proposal, and be fully heard. (D-4, D-5).

6. The Notice of Hearing was published May 21, and 28, 1984 in the Missoulian, a newspaper of general circulation in the county or counties in which the proposed groundwater area is located. (D-4). The attached bill to DNRC for publishing the Notice notes publication on only May 21 and 28, 1984. The

<sup>2</sup> Although the maps reflect 10 existing wells in the area, well No. 6 is the well being continuously recorded by DNRC, and it is not currently being used for domestic purposes.



Affidavit of Publication, however, states publication occurred on May 21, 28 and June 4, 1984. The evidence is therefore ambiguous whether publication occurred in the Missoulian 2 or 3 times.

7. The Notice of Hearing was also published May 21, 29, and June 4, 1984 in the Ravalli Republic, a newspaper of general circulation in the county in which the proposed area is located. (D-5).

8. Copies of the Notice, together with copies of the petition were served by mail, on May 18, 1984, upon each well driller licensed in Montana whose address is within any county in which any part of the area in question is located; each person or public agency known from an examination of the records in the Department's office to be a claimant or appropriator of groundwater in the area in question; and the Montana State Bureau of Mines and Geology. (D-3, Affidavit of Service<sup>3</sup>; testimony of Ronald J. Guse.)

9. The Department also mailed Notice to Mr. George Pike, Chief, US Geologic Survey, and Mr. Steven L. Pilcher, Chief, Dept. of Health and Environmental Science, Water Quality Bureau.

10. Petitioners agreed to comply with Board Rule § 36.12.103(i), Administrative Rules of Montana, and after notice thereof, requested Mr. Guse to proceed with notice of hearing.

<sup>3</sup> Although the Affidavit of Service indicates sending a Notice of Receipt of Permit Application, the Hearing Examiner concludes this was merely a clerical oversight as several in attendance at the hearing mentioned having received the notice in the mail. Further, the names on the service list correspond to those required by statute to be served herein.

On May 3, 1984, Mr. Guse, Mr. Lemire, Mr. Pengelly and Mr. Owen had an informal meeting regarding the procedural requirements for designation of the area. After being informed of the necessity of paying the filing fee, as well as a reasonable costs of notice, the petitioners agreed to proceed to hearing.

11. After conducting more than one on-site field investigation, and after reviewing the available literature on the geology and hydrology of the area, Mr. Lemire prepared a memorandum for Board review of the Petition.

12. On May 11, 1984, the Department submitted the Petition and accompanying documents to the Board. The Notice of Hearing and Appointment of Hearing Examiner was then approved by the Board. (D-3)

13. The area requested for designation is in approximately the center of the E $\frac{1}{2}$  of Section 19 and the W $\frac{1}{2}$  of Section 20, Township 9 North, Range 20 West, Ravalli County.

14. The aquifer in issue is a sand and gravel deposit approximately 50 feet below the land surface.

15. The exact boundaries of the aquifer are uncertain. The Petitioners arrived at their designated area by drawing lines on a map around the wells apparently tapping the same shallow aquifer (because drilled at approximately the same depth) along Larson Creek. (Testimony of Fred Burnell).

16. Mr. Scofield indicated general agreement regarding the shape of the aquifer, but guessed that it might be narrower.

17. Groundwater movement is generally at right angles to the contour of the land, and groundwater discharges into the lower Kootenai Creek. (D-2) Mr. Lemire noted that, based on the known geology of the area, he estimated the aquifer to be bounded on the west by the consolidated rocks of the mountain front, (middle of Section 19); to the north by Kootenai Creek; to the south by Sharrot Creek; and to the east by Kootenai Creek.

19. The amount of recharge to the area is a critical piece of information to the analysis of whether the aquifer is being lowered by the current amount of use, but is unknown. (D-2).

20. Because precipitation is a significant contributor to recharge, Mr. Lemire prepared a supplemental report including analysis of average annual precipitation records for Stevensville (the nearest record station). Mr. Lemire's report indicates that a "dry" cycle has existed since 1976, but that the last four years have been "wet" so that groundwater recharge from precipitation should be returning to normal. Further, although the continuous well recorder has not been operable long enough for conclusions to be drawn from its data, it does indicate that recharge to the aquifer from spring run-off does occur, as would be expected. (D-8, p.2).

21. At least some of the well users of the aquifer of concern are experiencing increasing difficulty extracting sufficient volumes of water for their domestic uses. (Testimony, Mr. Prellwitz, Petition, D-1).

22. The reasons for the increasing difficulty with various domestic wells are unclear. The well difficulties may reflect that total withdrawals from the aquifer are exceeding total recharge (mining) or may reflect complications with individual wells. (Testimony, Paul Lemire, Mr. Scofield.)

23. The continuous well recorder, having been installed in October, 1983, has been recording for an insufficient period of time for its data to supply the basis of any conclusions on whether the aquifer is being mined. (Testimony of Paul Lemire.)

24. Over a period of two additional years, the continuous well recorder would (by definition) continue to monitor the static water level in test well No. 6. This would supply three years of data from which the Department could make a preliminary estimate of whether the aquifer is being mined.

Wherefore, based upon the foregoing Findings of Fact, the Hearing Examiner hereby makes the following Proposed:

### III. CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and over the subject matter herein. §§ 85-2-113, 85-2-506, MCA, 1983.

a. The designation was proposed to the Board by the Department upon Petition signed by at least one-fourth of the users of groundwater in the proposed area.

b. The Petition alleged facts showing that groundwater levels or pressures in the area in question are declining.  
§ 85-2-506(2)(d), MCA (1983).

2. The Department gave proper notice of the hearing and all relevant substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter was properly before the Board. Although it is unclear whether the notice published in the Missoulian occurred two or three times, the statutory requirement of three successive weekly notices was met by published notice in the Ravalli Republic. § 85-2-506(5) MCA (1983).

3. Sufficient facts are not available to designate a permanent controlled groundwater area. The Board alternatively has the authority herein to designate a temporary controlled groundwater area. § 85-2-507(5)(a), MCA 1983 provides,

(5) (a) If at the conclusion of the hearing the board finds that sufficient facts are not available to designate or modify a permanent controlled groundwater area, the board may by order designate the area in question to be a temporary controlled groundwater area. Such order may include the corrective control provisions contained in subsection (4). A temporary controlled groundwater area shall be designated as such for a period not to exceed 2 years from the date of the board's order designating the temporary controlled groundwater area. The board may, for sufficient cause, extend the time period for an additional 2 years, and in this case all groundwater appropriators in the controlled groundwater area shall be notified of the extension.

4. The purpose of a temporary controlled groundwater area is to allow the Department to gather the facts necessary for determination of permanent controlled groundwater area criteria. § 85-2-507(5)(b), MCA 1983, provides,

(b) During the 2-year period, the department shall commence studies necessary to obtain the facts needed to assist in the designation or modification of a permanent controlled groundwater area. Facts gathered during the study period shall be presented at a hearing prior to the designation or modification of a permanent controlled groundwater area. All parties appearing at the first hearing shall be served notice of this hearing by mail at least 30 days prior to the date set for the hearing. The service shall be complete upon deposit of notice at the post office, postage prepaid, addressed to each person on whom service is to be made. Mailing of the notice, when completed, shall be considered to be sufficient notice of the hearing to all persons directly affected. The department shall file in its records proof of service by its own affidavit. The hearing shall be conducted by the board in the manner of the first hearing, and the board shall make written findings of fact and conclusions of law and issue an order according to the provisions set forth in subsections (1) through (4). In the event the department does not complete the necessary study in the 2-year period or extension thereof, the temporary controlled groundwater area designation will terminate at the end of the 2-year period or extension.

5. Pursuant to Board rule, the Petitioners may be required to, "...pay reasonable costs of giving notice, holding the hearing, conducting investigations and making records pursuant to Sections 85-2-506 and 85-2-507 MCA, except the cost of salaries of department personnel." ARM § 36.12.103(i).

6. No person may appropriate groundwater in a controlled area except by applying for and receiving a permit to appropriate from the Department. § 85-2-508 MCA (1983).

7. A temporary controlled groundwater area designation may include requirements necessary to protect the public health, safety, and welfare in accordance with the intent, purposes, and requirements of this part and the laws of the state.

8. A requirement that (for the period of temporary controlled groundwater designation) the number of wells allowed to tap the aquifer in issue be strictly limited by the Department, as set forth in the following Proposed Order, is necessary to protect the public welfare in accordance with the intent and purposes of the Water Use Act. §§ 85-2-101, 85-2-507 MCA (1983).

Wherefore, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following Proposed:

**FILMED**

ORDER

That, effective for two years from the date of the Board's final order, a Temporary Controlled Groundwater Area be established for a shallow aquifer approximately 50-70 feet below the surface of the ground and under approximately 150-200 acres of land along Larson Creek, in about the center of the E½ of Section 19 and the W½ of Section 20, Township 9 North, Range 20 West, Ravalli County, Montana, and further delineated on the map attached hereto as Exhibit "A".

During the period of temporary controlled designation, the Department shall accept Applications for Beneficial Water Use Permits to appropriate groundwater from the shallow aquifer as follows:

a) Each Application for Beneficial Water Use Permit to appropriate by means of a well shall be submitted to the Missoula Area Water Right Bureau Field Office. Upon receipt, Department personnel shall plot the proposed well site on a prepared map of the controlled area. Around each existing well will be plotted a circle, with the existing well being in the center thereof, and the radius of the circle being 263.3 feet. Such a circle will also be plotted around the proposed well site. No Application for Beneficial Water Use Permit to appropriate by means of a well of less than 70 feet in depth will be approved for issuance of a permit where the circle around the proposed site intersects the circle around any existing well. All other permit applications will follow the normal Department permit processing steps prior to issuance or denial.

b) The Department will commence studies necessary to obtain the facts needed to assist in the designation of a permanent controlled groundwater area.

c) Facts gathered by the Department will be presented at a hearing before the Board to be held within 90 days after the termination of the temporary controlled status.

d) The Temporary Controlled Groundwater Area designation shall automatically terminate two years from the date of the Board's final action herein, unless the Board, upon a showing of sufficient cause, extends the status for a period not to exceed an additional two years, in which case all petitioners shall be notified of any extension.

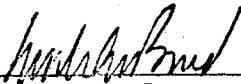


e) Petitioners shall pay reasonable costs of conducting investigations and making records, excluding costs for salaries of department personnel.

f) The Department may enforce this Order by means including, but not limited to, bringing an action for injunction in a district court of a district in which all or a part of the area affected is located.

g) No person may appropriate groundwater in a controlled area except by applying for and receiving a permit to appropriate from the Department. § 85-2-508 MCA (1983).

DONE this 16<sup>th</sup> day of August, 1984.

  
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Sarah A. Bond, Hearing Examiner  
Department of Natural Resources  
and Conservation  
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